In the Supreme Court of the United States

OCTOBER TERM, 197[illegible]

HIPOLITO VEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-590

HIPOLITO VEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having unlawfully received money for the broadcast of records over a radio station without disclosing such receipt to the radio station in advance of the broadcasts, in violation of 47 U.S.C. 508(a), and of perjury before the Federal Communications Commission in denying having received money from record companies to play records, in violation of 18 U.S.C. 1621. He was sentenced to concurrent prison terms of three months and fined $1,500. The court of appeals affirmed (Pet. App. A: 447 F. 2d 698).

450-370—71

Petitioner's principal contention is that it was error to have accepted his oral consent, expressed through and given after consultation with counsel, to excuse one juror who, during the jury's deliberations, had sent a note to the court describing himself as the "primary holdout."[1] Petitioner in effect argues that the right to a twelve-man jury cannot be waived. This issue is canvassed by the court below which properly concluded, as this Court has held, that the right to a twelve-man jury can be waived (*Patton* v. *United States,* 281 U.S. 276; *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 275; see also, *Singer* v. *United States,* 380 U.S. 24; cf. *Williams* v. *Florida,* 399 U.S. 78, 100–103),[2] and that the waiver here was intelligent and voluntary.

Petitioner also contends that the waiver was ineffective because not in accord with Rule 23(b), Fed. R. Crim. P., which provides that waiver of a twelve-

---

[1] The facts relating to this incident are set out in the opinion of the court of appeals (Pet. App. A 10–11).

[2] *Hibdon* v. *United States,* 204 F. 2d 834 (C.A. 6), relied on by petitioner (Pet. 5), is not to the contrary. There, in holding that the right to a unanimous verdict could not be waived, the court explicitly noted that the right to a verdict of less than twelve jurors could be relinquished. We note, moreover, that even if, contrary to the view of the court of appeals (Pet. App. A 13), this case is deemed to raise the issue whether a unanimous jury may be waived, this is a unique case which does not present a recurrent problem. Moreover, we think *Hibdon* is wrong. Since a defendant may waive a trial by jury and even trial itself (*Boykin* v. *Alabama,* 395 U.S. 238), there seems no reason why he may not validly waive a unanimous jury. See *Ashton* v. *Commonwealth,* 405 S. W. 2d 562, 570–571 (Ky. Ct. App.), reversed on other grounds, 384 U.S. 195; *State* v. *Robbins,* 176 Ohio St. 362, 199 N.E. 2d 742.

man jury must be by written stipulation of the parties with the approval of the court. The agreement here was not in writing. Petitioner, however, did not raise this objection either in the district court (where it could have been remedied) or in the court of appeals. The courts have held, in comparable circumstances, that where the fact of an agreement and its voluntariness are apparent from the record, non-adherence to the writing aspect of Rule 23 does not require reversal. See *Horne* v. *United States,* 264 F. 2d 40 (C.A. 5), certiorari denied, 360 U.S. 934; *Rogers* v. *United States,* 319 F. 2d 5 (C.A. 7), certiorari denied, 375 U.S. 989; *Bayless* v. *United States,* 381 F. 2d 67, 74–75 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971